

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FACEBOOK, INC.
Petitioner

v.

EVOLUTIONARY INTELLIGENCE, LLC
Patent Owner

Case IPR2014-00093
Patent 7,010,536 B1

Before KALYAN K. DESHPANDE, TREVOR M. JEFFERSON,
BRIAN J. McNAMARA, NEIL T. POWELL, and
GREGG I. ANDERSON, *Administrative Patent Judges*.

DESHPANDE, *Administrative Patent Judge*.

DECISION
Petitioner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

Facebook, Inc. (“Petitioner”) filed a request for rehearing (Paper 13 “Req. Reh’g”) of the Board’s decision, dated April 28, 2014, which denied institution of *inter partes* review of claims 15 and 16 of U.S. Patent 7,010,536 B1. Paper 12. Petitioner contends that the Board should have instituted review of claim 15 as anticipated by Cooper and claim 16 as obvious over Cooper, Fortune, and Veditz. Req. Reh’g 2. For the reasons stated below, Petitioner’s request is denied.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus. Inc. v. Celanese Polymer Specialties Co. Inc.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted). The request must identify, specifically, all matters the party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d).

III. DISCUSSION

Petitioner contends that the Board misapprehended or overlooked the following: the Petition established that the real key is a “register,” the Petition established that the real key “forms part of” the file management program “container,” the Petition established that a software product file is a “container” that is “added” to the file management program “container,” and the Petition established that the real key “controls” whether a software product file container is added to the file management program container. Req. Reh’g 5-17.

A. The Petition failed to establish that the real key is a “register” and the real key “forms part of” the file management program “container”

Petitioner argues that the Board misapprehended or overlooked Petitioner’s argument that the real key is a “register” and the real key “forms part of” the file management program “container.” Req. Reh’g 5-8. Petitioner specifically argues that the real key is a “register,” under the broadest reasonable interpretation, because the real key is (1) a “value” and (2) “associated with a container.” Req. Reh’g 5 (citing Decision 17). Petitioner further argues that the real key is “associated with” the “file management program” in Cooper because the file management program container (1) generates the real key, (2) validates the real key, and (3) uses the real key. Req. Reh’g 6 (citing Ex. 1003, 16:5-8, 16:19-27, 16:39-46, Fig. 23). Petitioner also argues that the real key “forms part of the container,” under the broadest reasonable interpretation, because the file management program in Cooper (1) generates the real key, (2) validates the real key, and (3) uses the real key. Req. Reh’g 7-8.

Petitioner’s argument that the real key is “associated with a container” and “forms part of the container” because Cooper’s file management program generates, validates, and uses the real key, however, was not raised until this request for rehearing. Although Petitioner cites portions of Cooper that disclose the generation, validation, and use of the real key, Petitioner has not directed us to where this argument was presented in the Petition. Accordingly, we did not misapprehend or overlook this argument because it was not previously presented. Although 37 C.F.R. § 42.71(d) permits a party to file a request for rehearing, it is not an opportunity to submit new arguments.

Furthermore, the Board determined that Petitioner had failed to establish that Cooper discloses that the “real key” is “associated with” and “forms part of” the

file management program *within the meaning of claim 15*. Decision 17-18. Petitioner's argument that Cooper's real key "forms part of the container" because Cooper's file management program generates, validates, and uses the real key still fails to illustrate how the steps generating, validating, and using the real key discloses that the real key "forms part of the" file management program container. Petitioner has not provided any evidence or rationale that explains how the steps of generating, validating, and using the real key means the real key "forms part of the" file management program container. Accordingly, although this argument is first raised on this request for rehearing and therefore we could not have misapprehended or overlooked it, this argument is also not persuasive.

B. The Petition failed to establish that a software product file is a "container" that is "added" to the file management program "container"

Petitioner contends that the Board misapprehended Petitioner's argument when we stated that "we are not persuaded that once the 'real key' is used to decrypt software, the decrypted software, as a 'register' or 'container,' is added to the file management program." Req. Reh'g 8-9 (citing Decision 18). Petitioner states that, instead of decrypted software, it identified encrypted software as the "container added to the file management program." Req. Reh'g 9. In support of this contention, Petitioner points to the following argument in the Petition:

When a user attempts to access an encrypted software product file, the file management program uses the 'real key' to determine whether access will be permitted. . . . The 'real key' accordingly qualifies as an 'acquire register' because it is used to control whether the container (e.g., the file management program) will add a container (e.g., a software product file) from other containers (e.g., the group of software product files on disk)"

Req. Reh'g 9 (citing Pet. 41). Petitioner further argues that the “encrypted software” is “applied as an input” to the decryption engine, where the decryption engine is part of the file management program (emphasis in original). Req. Reh'g 10-11. Petitioner argues that “[b]ecause the encrypted software product file is input in to the file management program container, it is ‘added’ to that container.” Req. Reh'g 11-13.

Petitioner’s argument that the “encrypted software,” and not the “decrypted software,” is the container being added, i.e., that the “encrypted software program file” is “applied as input” and therefore “added” to the file management program container, was not presented in the Petition. Notwithstanding the material Petitioner cites at pages 39 and 41 (quoted above) of the Petition concerning an acquire register, the Petition does not argue that applying the software program file as input is the same as adding that software program file to the file management program container. Citing only to Cooper, Petitioner first presents this argument in the Request for Rehearing. Req. Reh'g 10-11. Accordingly, we could not have overlooked or misapprehended this argument because it was not previously presented.

Additionally, we are not persuaded that a software program file container “applied as input” to an engine of file management program container necessitates that the one container is added to the other container. Although Petitioner argues that there is no requirement of physically adding a container, in light of the Board’s broadest reasonable construction of “container,” Petitioner has not provided any evidence or rationale illustrating how the input of a software product file to a decryption engine constitutes “adding” the input software product file to the file management program “logically defined data enclosure” or container. *See* Decision 9 (emphasis added).

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